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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, [redacted] 1970

No. [redacted] 297

E. MICHAEL McCANN, *Appellant,*

v.

SIDNEY G. BABBITZ, *Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

JURISDICTIONAL STATEMENT

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No. _____

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SIDNEY G. BABBITZ, *Appellee*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of a 3-judge panel of the United States District Court for the Eastern District of Wisconsin entered on March 5, 1970 and amended on March 11, 1970. This judgment declared unconstitutional secs. 940.04 (1) and (5) of the Wisconsin Statutes, which define the crime of abortion, but denied appellee's request for an injunction to stop appellant from prosecuting him under those provisions. Appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial federal questions are presented.

OPINION BELOW

The opinion of the 3-judge panel of the United States District Court for the Eastern District of Wisconsin is reported as *Babbitz v. McCann* (E.D. Wis., 1970) 310 F. Supp. 293. A copy of this opinion is attached to this Statement as Exhibit A. An opinion of the Hon. John W. Reynolds, District Judge, granting appellee's request for the convening of a 3-judge court pursuant to 28 U.S.C. § 2281 is reported as *Babbitz v. McCann* (E.D. Wis., 1969), 306 F. Supp. 400.

JURISDICTION

This suit was brought under 28 U.S.C. § 1343. Appellee sought a declaratory judgment that a statute of the State of Wisconsin was unconstitutional, pursuant to 28 U.S.C. § 2201, and also sought to enjoin the enforcement of the same state statute, pursuant to 42 U.S.C. § 1983. A 3-judge district court was convened pursuant to 28 U.S.C. § § 2281 and 2284.

On March 5, 1970, the judgment of the district court was entered. On March 11, 1970, the form of the judgment was amended and an amended judgment entered. On April 3, 1970, a notice of appeal to the Supreme Court of the United States was filed in the district court.[1]

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. § 2101 (b) and by 28 U.S.C. § 1253, which permits appeals by "any party" from orders like the one entered in this case. The following decisions sustain the jurisdiction of the Supreme Court to review

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[1] On the same date, a precautionary notice of appeal to the United States Court of Appeals for the Seventh Circuit was also filed in the district court.

the judgment on direct appeal in this case: *Allen v. State Board of Elections* (1969), 393 U.S. 544 (At 560, fn. 25, by implication), *Kramer v. Union School District* (1969), 395 U.S. 621 (At 625, by implication).

UNITED STATES CONSTITUTIONAL PROVISION INVOLVED

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const., Amend. IX.

WISCONSIN STATUTE INVOLVED

940.04 Abortion. "(1) Any person, other than the mother, who intentionally destroys the life of an unborn child may be fined not more than $5,000 or imprisoned not more than 3 years or both.

"***

"***

"***

"(5) This section does not apply to a therapeutic abortion which:

"(a) Is performed by a physician; and

"(b) Is necessary, or is advised by 2 other physicians as necessary, to save the life of the mother; and

"(c) Unless an emergency prevents, is performed in a licensed maternity hospital.

"(6) In this section 'unborn child' means a human being from the time of conception until it is born alive." *II Wisconsin Statutes, 1967*, Chapter 940, pp. 4228, 4229.

QUESTIONS PRESENTED

1. Does the Ninth Amendment to the United States Constitution (or any other constitutional provision) guarantee expectant mothers a right to an abortion at any time before the unborn child has "quickened"?

Three-judge court said, "Yes."

2. If so, does a man being prosecuted under a criminal abortion statute that specifically exempts expectant mothers have standing to assert the constitutional rights of expectant mothers so as to obtain a federal declaratory judgment that the statute under which he is being prosecuted is unconstitutional?

Three-judge court implicitly said, "Yes."

3. If so, was it constitutionally unreasonable for the state to limit a woman's right to an abortion by making abortions unlawful except when necessary to preserve the life of a mother?

Three-judge court said, "Yes."

STATEMENT OF THE CASE

Appellant, E. Michael McCann, is the district attorney of Milwaukee County, Wisconsin. Being responsible for enforcing the criminal laws of that state, he had begun criminal proceedings against appellee in the county court of Milwaukee County. In this state court, appellee stood charged with the crime of abortion, a violation of sec. 940.04 (1) and (5) of the Wisconsin Statutes. The warrant issued against appellee, which is quoted in the opinion of the district court attached as Exhibit A, indicates that the complaining witness was the mother of the "unborn child" whose life defendant allegedly destroyed.

After proceedings had begun in state court but before preliminary examination, appellee commenced an action for "equitable relief" in the United States District Court for the Eastern District of Wisconsin, naming as defendants (1) appellant, (2) F. Ryan Duffy, Jr., Judge of the County Court, Milwaukee County, Wisconsin, the magistrate before whom appellee's preliminary examination was then pending, and (3) the City of Milwaukee's Police Department. Alleging a number of different constitutional deficiencies in the Wisconsin Statute under which he was being prosecuted, appellee asked the court to enter a temporary restraining order pursuant to 28 U.S.C. § 2284 (3), to prevent the defendants "from holding any other proceedings in connection with said criminal action" in state court. Appellee also asked for the convening of a 3-judge district court, pursuant to 28 U.S.C. § § 2281 and 2284, for a "preliminary and permanent injunction restraining the defendants *** from prosecuting" appellee under Wisconsin's abortion statute, and for a declaratory judgment that the Wisconsin Statute involved was unconstitutional. See, 28 U.S.C. § 2201.

On December 2, 1969, United States District Court Judge John W. Reynolds entered an opinion and order denying appellee's request for a temporary restraining order, but granting his request for the convening of a 3-judge court. *Babbitz v. McCann* (E.D. Wis., 1969), 306 F. Supp. 400.[2] On the same day, the court requested the Chief Judge of the Seventh Circuit to name a 3-judge panel. *Id.* p. 402.

Appellant's answer admitted substantially all the material factual allegations of appellee's complaint, but denied most of his legal claims. Appellant submitted a typewritten, double-spaced brief of 32 pages to the court on the legal issues arising from appellee's claim. Appellee submitted two briefs in similar form, one of 41 pages and another of 25 pages. In addition, six *amicus curiae* briefs were filed. One of these briefs, which supported appellant's position, was submitted by the Attorney General of the State of Wisconsin.

On January 23, 1970, the 3-judge district court convened in the Federal Building in Milwaukee, Wisconsin, for a hearing. Testimony was taken and oral argument was heard. At the conclusion of the hearing, the court announced that it would take the matter under advisement.

On March 5, 1970, the court filed its *per curiam* opinion together with a judgment. The court's opinion concluded:

> "The plaintiff [appellee] is entitled to a declaratory judgment declaring §§940.04 (1) and (5) violative of the United States Constitution. The plaintiff is not entitled to an injunction enjoining the defendants [appellant and others] from prosecuting the plaintiff under § § 940.04 (1) and (5).
>
> "IT IS SO ORDERED."

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[2] The court's opinion notes that "on stipulation of the parties, the Milwaukee Police Department's motion to be dismissed as an improper party has been granted." *Id.* p. 401.

On March 11, 1970, the form of the judgment was amended to reflect the fact that the court had denied "the injunctive relief sought by the plaintiff [appellee]."

Several features of the court's opinion are worthy of note.

First, the court rejected appellee's claim that the challenged statute was unconstitutionally vague. It ruled "that § 940.04(5) sets forth with reasonable clarity and sufficient particularity the kind of conduct which will constitute a violation."

Second, the court rejected appellee's contention that the statute denied him the equal protection of the laws guaranteed by the Fourteenth Amendment.

Third, citing the Ninth Amendment to the United States Constitution and "recent Supreme Court pronouncements regarding the ninth amendment," the court held "that the state of Wisconsin may not, in the manner set forth in § § 940.04(1) and (5) Wis. Stats., deprive a woman of her private decision to bear her unquickened child."

Fourth, the court did not predicate its opinion in any substantial sense either on the testimony it had heard, on the scientific treatises to which it had been referred, or on philosophical or theological arguments. The court expressly declined to resolve the question "as to when an embryo becomes a child," holding that the mother's rights were superior whether the embryo was "mere protoplasm" or a "human being." The court also noted:

> "While problems of over-population, ecology and pollution have been brought to our attention, we deem them secondary as decisional factors in a judicial resolution of the issues at hand. So, too, we find it necessary to set aside arguments involving theological and ecclesiastical considerations."

Fifth, the court expressly refrained from ruling on "the question of a woman's aborting a fetus which has already quickened." The court also said that "it is permissible for the state to require that abortions be conducted by qualified physicians."

Sixth, the court's opinion appears to indicate that the state can impose no restrictions whatsoever on a mother's "private right," before her unborn child has quickened, to have it destroyed, as long as its destruction is accomplished with medical supervision and under sanitary conditions. Relevant language follows:

> "***[T]he mother's interests are superior to that of an unquickened embryo, whether the embryo is mere protoplasm, as the plaintiff contends, or a human being, as the Wisconsin statute declares.
>
> "There are a number of situations in which there are especially forceful reasons to support a woman's desire to reject an embryo. These include a rubella or thalidomide pregnancy and one stemming from rape or incest. The instant statute does not distinguish these special cases, but in our opinion, the state does not have a compelling interest even in the normal situation to require a woman to remain pregnant during the early months following her conception.
>
> "***The police power of the state does not ***entitle it to deny to a woman the basic right reserved to her under the ninth amendment to decide whether she should carry or reject an embryo which has not quickened."

THE QUESTIONS ARE SUBSTANTIAL

1. This appeal poses questions similar to those raised by the decision in *U. S. v. Vuitch* (D.C., 1969), 305 F.Supp. 1032 which this court has already agreed to review. *U.S. v. Vuitch* (April 27, 1970), 38 LW 3419, 3421 (No. 1155). Both appeals challenge rulings by United States District Courts that statutes making it a crime to perform certain kinds of abortions are unconstitutional. Both lower court decisions sprang from cases in which alleged abortionists had hurled a variety of constitutional attacks on statutes making abortion a crime.

This appeal, however, raises broader questions of far more pervasive import than does the appeal in *Vuitch*. In *Vuitch*, the lower court ruled only that the District of Columbia abortion statute was unconstitutionally vague. Accordingly, legislative correction of this constitutional deficiency, if any there be, could presumably be accomplished merely by substituting a less ambiguous statute for the one found wanting.

The opinion of the 3-judge court in this case, on the other hand, appears to indicate that the United States Constitution bars Wisconsin *and therefore all other states* from imposing *any* restrictions on abortions or any criminal sanctions on abortionists, at least as long as the fetus has not "quickened," and as long as its destruction is accomplished under medically approved conditions. In other words, if this ruling stands, *Wisconsin is without power* to correct constitutional deficiencies in its statute because it is without power to enact any such statute in the first place, however delicately such a law might balance competing interests and however finely drawn and carefully drafted it might be. Indeed, if this ruling stands, even the "liberalized" abortion statutes recently enacted by several states are unconstitutional.

2. The decision of the 3-judge district court from which appellant appeals was squarely based upon a "right of privacy"

or "private right" which the court said was guaranteed by the Ninth Amendment to the United States Constitution. With respect to this aspect of the court's reasoning, three things are noteworthy.

First, at least two present United States Supreme Court Justices, Hon. Hugo R. Black and Hon. Potter Stewart, have persuasively maintained that neither any claimed "right of privacy," nor any concept of so-called "private rights," provides any basis whatsoever for a court to strike down a state statute as unconstitutional. See, *Griswold v. Connecticut* (1965), 381 U.S. 479, 507-27 (Black, J., dissenting opinion) 527-31 (Stewart, J., dissenting opinion). A third, Hon. John M. Harlan, also apparently does not recognize the existence of any such rights in those express terms, although he does say that the Constitution protects the citizenry against enactments that violate "basic values 'implicit in the concept of ordered liberty.' " *Griswold, supra*, p. 500 (Harlan, J., dissenting opinion).

Second, although this court has rightly paid due respect to the *value* and to the *importance* of privacy, marriage, and family, it has never recognized a definable constitutionally protected *right* of *personal* privacy, as such, nor has it recognized any generalized concept of a "private right," (whatever that may mean). *Griswold, supra*, which is by all odds the leading case on the subject and the only one arguably to the contrary, does not say otherwise.[3] In *Griswold*, the court held that the Constitution bars criminal prosecution under a statute forbidding the use of contraceptives. As indicated previously, three Justices, two of whom were dissenters and all three of whom

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[3] *Loving v. Virginia* (1967), 388 U.S. 1, the only other recent Supreme Court case relied upon by the court to establish its point, was expressly grounded upon the Fourteenth Amendment's guarantee of the equal protection of the laws. *Loving*, pointing to "invidious racial discriminations," *Id.* p. 12, struck down a state statute forbidding interracial marriages.

remain on the Supreme Court, refused to join the opinion of the court and did not recognize the existence, as such, of any kind of constitutionally protected "right of privacy" whatsoever.

The remaining six Justices said *only* that laws operating directly on an intimate relation of husband and wife, that is, laws that regulate the intimacies of the marriage relationship, offend a *right of marital privacy*. Justice White said that constitutional protection extended to a right "to be free of regulation of the intimacies of the *marriage* relationship." *Id.* (emphasis added) (concurring opinion), pp. 502-03. Justices Goldberg and Brennan and Chief Justice Warren repeatedly refer to a constitutionally protected "right of *marital* privacy," *Id.* (emphasis added) pp. 486, 487, 495, 497 (thrice), a "right of privacy *in marriage*." *Id.* (emphasis added), pp. 491, 495, an "area of privacy–that of the *marital* relation and the *marital* home," *Id.* (emphasis added), p. 495, the "privacy of all *married* couples," Id. (emphasis added), p. 498, and the "right of privacy in the *marital* relation." *Id.* (emphasis added), p. 499. In hardly less explicit fashion, the opinion of the court (joined by Justices Douglas, Clark, Goldberg, Brennan, and Chief Justice Warren) relied upon a right of privacy *in the marital* relationship. Id. pp. 480-86, especially pp. 482, 485-86. (Since *Griswold*, the Supreme Court has not seen fit to extend, as such, this "right of marital privacy." Thus, no member of the Supreme Court has yet acknowledged the existence of constitutionally protected, broad, generalized rights of *personal* privacy or rights of *individual* privacy or "private rights." It was precisely on the existence of such claimed rights that the opinion of the court below was predicated.

Third, in their *concurring* opinion in *Griswold*, three Justices (one of whom, Hon. William J. Brennan, remains on the Court) contended that the Ninth Amendment in and of itself provided a sufficient basis for a court to strike down a law

as unconstitutional. However, the opinion of the court in that case was not grounded primarily on the Ninth Amendment. As of today, neither this court nor any passing majority of its members has ever said that the Ninth Amendment, standing alone, affords a vehicle for federal court intervention in the affairs of states. It was solely on the Ninth Amendment that the decision of the 3-judge court below was based.

3. If there is some constitutionally protected "right of privacy," it is hard to see how or why it extends to a mother's desire to destroy her unborn child before its quickening. Nevertheless, the 3-judge district court in this case did hold, in a statement central to its decision, that a mother's rights of privacy (also described in the opinion as "private rights" and as "inherently personal right [s]") include "the basic right reserved to her under the Ninth Amendment to decide whether she should carry or reject an embryo which has not yet quickened."[1]

It is safe to say that this is a startling proposition. It would probably have been at least as startling to the framers of the United States Constitution, as it in fact was to Wisconsin's lawmakers who had no idea they were defying the Constitution by paying no heed to vociferous efforts to water down or abolish Wisconsin's criminal abortion statute. It rests, moreover, upon a thin or illusory foundation in legal precedent. Indeed, it appears to be supported directly only by *dicta* in two recent cases, *United States v. Vuitch* (D.C., 1969), 305 F.Supp. 1032 and *People v. Belous* (1969), 80 Cal. Rptr. 354, 458 P.2d 194 (4-3 decision).

In *Vuitch*, the court remarked that a woman's "right of privacy * * * may well include the right to remove an unwanted child at least in early stages of pregnancy." *Id.* p. 1032. No

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[1] The court's opinion appears to indicate that this claimed "right" is substantially absolute.

authority is cited for the precise proposition involved. As indicated previously, this court has already agreed to review the *Vuitch* decision.

In *Belous*, the majority reasoned as follows:

> "The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this Court's repeated acknowledgement of a 'right of privacy' or 'liberty' in matters related to marriage, family and sex. That such a right is not enumerated in either the United States or California Constitutions is no impediment to the existence of the right." 80 Cal. Rptr. at 359-60 (citations omitted).

Again, legal authority is lacking.

Apparently, the proposition that a constitutional "right of privacy" (assuming, *arguendo*, that one exists) entails a right to destroy one's unquickened fetus must rest on reasoning, rather than authority. But of reasoning on the question in point, there is precious little. Neither *Vuitch* nor *Belous* do more than assume and assert the proposition at issue. Nor is the opinion of the court in this case any more illuminating.

None of the three opinions, of course, cites any provisions in the text of the Constitution as establishing a right to destroy one's unquickened children. None of the three opinions adverts to any kind of historical source that might serve to suggest that the Constitution's framers had intended to guarantee such a right.

Less understandably, none of these opinions does anything to pour content into the notion of "private rights" or "rights of privacy." None defines "private rights" or "rights of privacy." None so much as suggests a basis, other than sheer assertion, for determining what "rights" are components of the "right of privacy" and which ones are not, or for determining which

rights are and which are not "private rights" protected by the Ninth Amendment.

None of the opinions, including the one before the court on appeal in this case, does any more than associate "private rights" and "rights of privacy" in some vague sense with marriage, home, sex, and the family. Marriage, home, sex, and the family are all concepts that in their usual application have reference to *relationships* between two or more people, typically, husband and wife and perhaps their children. Such concepts were all the 3-judge district court in this case could invoke to support its finding of a so-called "private right" of *one member* of the family unit to destroy another potential member of the family unit, without the consent of other members or for that matter without even having to *consult* with, for example, the father of the unborn child she herself, unilaterally, elects to destroy. The court's reasoning, appellant submits, will not hold water.

It may be that "private rights" and "rights of privacy," are notions so nebulous and elusive that they simply are not susceptible to rational application. But if that be the case, they serve as nothing more than verbal camouflage for the fact that judges are imposing their own notions of social policy on a populace whose elected representatives have persistently taken opposite positions on the same questions of social policy. The Supreme Court, appellant submits, should be astute to prevent such a result, so contrary to the best tradition of our constitutionally established representative democracy.

If there is any meaning at all to the central proposition of the decision on appeal in this case, that is, that a pregnant woman has a Ninth Amendment right "to decide whether she should carry or reject an embryo which has not yet quickened," it must mean one of two things. Either it means (1) that she has

a "private right" of personal freedom which permits her to decide whether to sustain and support, or whether to eliminate, those of her dependents whom she, alone, may decide are "defective" hard to care for, or otherwise simply unwanted; or it means (2) that she has some kind of right to bodily integrity which permits her and her alone to decide under all circumstances whether to yield or retain substances contained within her own body.

If the 3-judge court below intended to propound the former proposition, (1), then it enshrined in our laws a terrifying principle that would equally justify infanticide, euthanasia, and for that matter, plain, simple, old-fashioned murder, as long as the victims were dependent upon their slayer and unable to shift for themselves. Moreover, the same principle would appear to render unconstitutional most laws relating to family obligations, including those forbidding abandonment, nonsupport, child neglect, *etc.*

If the court below instead relied upon the latter proposition, (2), then it at least propounded a rhetorically attractive idea. The problem with this idea is that it has been impliedly rejected by courts, including the Supreme Court, with a remarkable degree of consistency. If there were a "right of bodily integrity" which entailed a right to decide whether to yield or retain bodily substances, then for example, a 1966 decision of the Supreme Court, *Schmerber v. California* (1966), 384 U.S. 757, would have to be overruled. In *Schmerber*, the Supreme Court sanctioned as against numerous constitutional attacks the forcible extraction of blood from a drunken driving suspect. Other courts have sanctioned police supervised forcible rectal examinations, extraction of urine, and administration of emetics on suspects. See, *Annotation*, 16 L.Ed. 2d 1332, 1338-43. At least two courts have ordered unwilling women members of Jehovah's Witnesses to undergo blood transfusions despite

their religious and constitutional objections. *Application of President and Directors of Georgetown College, Inc.* (D.C. Cir., 1964), 331 F. 2d 1000, *cert. den.* (1964), 377 U.S. 978; *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson* (1964), 42 N.J. 421, 201 A. 2d 537, *cert. den.* (1964), 377 U.S. 985. In the New Jersey case, the woman was pregnant, and the hospital had asked the court for permission to administer transfusions if "such transfusions should be necessary to save her life and the life of the unborn child." *Raleigh Fitkin-Paul, supra*, 201 A. 2d 537, 537. The court permitted "such transfusions as may be necessary to preserve the lives of the mother and the child." *Id.* p. 58. The court noted:

> "We are satisfied that the unborn child is entitled to the law's protection and that an appropriate order should be made to insure blood transfusions to the mother in the event that they are necessary in the opinion of the physician in charge at the time.
>
> "We have no difficulty in so deciding with respect to an infant child. The more difficult question is whether an adult may be compelled to submit to such medical procedures ***." *Id.* p. 538.

Appellant submits that there is no basis in either reason or authority for the central proposition of the lower court's ruling in this case. Not only should the judgment itself be corrected, but the curious and disturbing gloss put on the Constitution of the United States by the district court's opinion in this case should be promptly and cleanly erased.

4. Still another troubling facet of the district court's decision in this case was that it was exclusively grounded on what were asserted to be the "*private* rights" *of pregnant women* or "mothers." No woman, pregnant or otherwise, was ever a party to this lawsuit. In particular, appellee, Sidney G. Babbitz, was neither pregnant, nor a woman. He is male and, allegedly, an

abortionist. In the court below, he acted, successfully, as the champion of rights obviously not his own, that is, the "rights" of expectant mothers to destroy their unborn children before quickening.

Appellant submits that appellee lacked standing to assert the claimed rights of pregnant women and that the district court should have so ruled.

The Supreme Court has said, "Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party." *Barrows v. Jackson* (1953), 346 U.S. 249, 255.

This rule is not absolute. See, *Barrows, supra*, pp. 254-60. Nevertheless, in the absence of "weighty countervailing policies," the rule of federal courts is "that a litigant may only assert his own constitutional rights or immunities." *United States v. Raines* (1960), 362 U.S. 17, 22. (Brennan, J.). No "weighty countervailing policies" were apparent in the case that prompted the decision of the court below nor were any even adverted to in the court's opinion.

McGowan v. Maryland (1961), 366 U.S. 420, nicely illustrates the application of this rule. Appellants in that case were employees of a department store who had been convicted and fined for selling goods on Sunday in violation of Maryland's Sunday closing laws. As to one of their contentions, the Supreme Court reasoned and ruled as follows:

> "First, appellants contend here that the statutes *** violate the constitutional guarantee of freedom of religion in that the statutes effect is to prohibit the free exercise of religion in contravention of the First Amendment, made applicable to States by the Fourteenth Amendment. But appellants allege only economic injury to themselves; they do not allege any infringement of their own religious freedoms due to Sunday closing. In fact, the record is silent as to what appellants' religious beliefs are.

Since the general rule is that 'a litigant may only assert his own constitutional rights and immunities,' we hold that appellants have no standing to raise this contention. *** Those persons whose religious rights are allegedly impaired by the statutes are not without effective ways to assert these rights. Appellants present no weighty countervailing policies here to cause an exception to our general principles." *McGowan, supra,* pp. 429-30 (Warren, C.J.) (citations omitted).

Appellant submits that it is impossible to distinguish *McGowan, supra,* from the present case. Even more closely in point, however, is *Tileston v. Ullman* (1943), 318 U.S. 44. In *Tileston*, a physician (like appellee here) had sought a declaratory judgment (like appellee here) that state statutes prohibiting the use of contraceptives and the giving of assistance or counsel in their use were unconstitutional. The claim put in issue by the physician (like the one put in issue by the district court's opinion in this case) was *not* that the physician's rights, but that *his patients'* rights, specifically their rights to life, were violated by the statutory provisions at issue.

In a unanimous *per curiam* decision, this court held as follows:

"We are of the opinion that the proceedings in the state courts present no constitutional question which appellant has standing to assert. The sole constitutional attack upon the statutes under the Fourteenth Amendment is confined to their deprivation of life--obviously not appellant's but his patients'. There is no allegation, or proof that appellant's life is in danger. His patients are not parties to this proceeding and there is no basis on which we can say that he has standing to secure an adjudication of his patients' constitutional right to life, which they do not assert in their own behalf." *Tileston, supra,* p. 46.

Tileston is still good law.[5] It has been cited with approval in *Flast v. Cohen* (1968), 392 U.S. 83, 95, *Alderman v. United States* (1969), 394 U.S. 165, 174, and *Jenkins v. McKeithen* (1969), 395 U.S. 411, 421. Its central principle, that rights may not be vicariously asserted, was expressly reaffirmed in 1969. See, *Alderman, supra,* p. 174. It is on all fours with the case on appeal and, as far as appellant can say, dictates reversal of the decision below.

Two ironic facets of this case render doubly plain and egregious the district court's error in letting appellee, an alleged abortionist, assert successfully the claimed "rights" of potential mothers.

First, appellee stands charged with a violation of sec. 940.04 (1) of the Wisconsin Statutes which provides in relevant part: "Any person, *other than the mother,* who intentionally destroys the life of an unborn child may be [punished] (emphasis added)." It was precisely this subsection of the Wisconsin Statutes (coupled with another) that the 3-judge district court held to be unconstitutional. As is obvious, *the parties whose*

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[5] *Griswold v. Connecticut* (1965), 381 U.S. 479, which has already been extensively discussed above, does not say otherwise. In *Griswold,* the court did not overrule, but distinguished *Tileston* by pointing out (1) that the *Griswold* appellants had already been convicted and punished for a crime, whereas the *Tileston* appellants had been victims only of an adverse declaratory judgment, and (2) that the *Griswold* appellants had been convicted as aiders and abettors of the very same crime ("use" of contraceptives) which, they claimed, violated their patients' rights of marital privacy, whereas the *Tileston* appellants could claim no such close "nexus."

In this case, appellant has not yet been convicted or punished for a crime, but has only obtained a favorable declaratory judgment. Moreover, not only is appellant in this case *not* being prosecuted as aider and abettor of some crime which can *only* be directly committed by those (potential mothers) whose rights he asserts, but the crime with which he stands charged, and *the precise statutory subsection found to be unconstitutional by the district court* expressly exempts potential mothers from prosecution. Sec. 940.04 (1)Wis. Stats. reads: "Any person, *other than the mother,* who intentionally destroys the life of an unborn child may be [punished]." (Emphasis added)

Thus, this case falls outside the boundaries of *Griswold* and squarely within the rule established in *Tileston.*

rights were vicariously asserted (potential mothers)' are expressly exempted from prosecution under the very statutory provisions held unconstitutional by the court below.

Second, the mother of the unborn child whom appellant was charged with destroying and the only potential mother whose claimed "rights" were visibly at stake in this lawsuit not only was not a party to the action, but was and remains the chief complaining witness *against appellee* in the state court.

It would be ironic indeed if the decision below were let stand to cast doubt upon the abortion laws of most states. If the Supreme Court does not think that summary reversal in light of *Tileston* is warranted, then surely this case at least deserves plenary consideration.

5. Neither the 3-judge district court in this case, nor appellee himself, ever suggested that either "rights of privacy" or "private rights," whatever they may be, were absolute. Both acknowledged that at very least such rights could be outweighed by some state interest or constellation of interests that could be considered "compelling" or "subordinating." On this understanding, both parties submitted a vast quantity of information and argument to the court suggesting that Wisconsin did or did not have some legitimate interest in limiting abortions to "therapeutic" ones as defined by sec. 940.04 (5) of the Wisconsin Statutes.

Generally speaking, the 3-judge court below appears to have ignored most of this information. It observed, for example,

> "While problems of over-population, ecology and pollution have been brought to our attention, we deem them secondary as decisional factors in a judicial resolution of the issues at hand. So, too, we find it necessary to set aside arguments involving theological and ecclesiastical considerations."

What the court chose to "set aside," without elaborating upon its reasons for doing so, was by far the most important justification suggested by appellant for the existence of Wisconsin's criminal abortion statute, namely, the state's interest in protecting, indeed, its obligation to protect, the unborn child.[6] The humanistic motives behind Wisconsin's policy in this respect are in part reflected by the words of subsection (6) of its criminal abortion statute, sec. 940.04, Wis. Stats.: "In this section 'unborn child' means *a human being* from the time of conception until it is born alive." (emphasis added)

To appellant's chief contention, which was supported by a great volume of legal, medical, and biological evidence, the court's total response was three, short, conclusory sentences:

> "[Appellant] urge[s] that the state's interest in protecting the embryo is a sufficient basis to sustain the statute. Upon a balancing of the relevant interests, we hold that a woman's right to refuse to carry an embryo during the months of pregnancy may not be invaded by the state without a more compelling public necessity than is reflected in the statute in question. As measured against the claimed 'rights' of an embryo of four months or less, we hold that the mother's right transcends that of such an embryo."

To this, the court added a deeply disturbing and discordant note:

> "We are invited to resolve the philosophical question, raised in some of the amicus curiae briefs, as to when an embryo becomes a child. For the purposes of this decision, we think it is sufficient to conclude that *the mother's interests are superior to that of* an unquickened embryo, whether the embryo is mere protoplasm, as [appellee] contends, or *a human being*, as the Wisconsin Statute declares." (emphasis added)

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[6] Obviously, there are other arguably defensible justifications. In this Statement only the primary one will be elaborated upon.

However charitably or generously it may be construed, this language leads inescapably to two conclusions:

First, the court below was not prepared to give any weight whatsoever to any of the legal or biological data supporting the state's claimed interest in protecting the unborn. Even had the fetus been shown to be in all respects "a human being" the court was prepared to say that this "human being" could be exterminated by its mother at her pleasure for reasons of convenience or fancy and that Wisconsin was constitutionally powerless to forbid or redress this particular kind of human destruction.

Second, the court was prepared to say (and, in effect, did say) that someone (the mother) had absolute power of life and death, subject to no legal restrictions whatsoever, over *a human being* (so long as the destruction of this human being, of course, was hygienically accomplished).

It may be that the court's language was careless or imprecise. It may be that its language represented an effort to avoid, or to disguise its resolution of, a troublesome question. Or it may be that its language was deliberately chosen and carefully drafted. In any event, a conclusion so hastily drawn and a precedent so far-reaching and dangerous should be given plenary consideration by this court.

Whether the court's "balancing of interests" was "correct," of course, is another question, one which, in large part, is beyond the scope of this Statement. Nevertheless, some preliminary observations are in order. Perhaps an appropriate starting point is an offhand observation in the opinion of the district court in this case, namely, "the state does not have a compelling interest even in the normal situation *to require a woman to remain pregnant* during the early months following *her* conception." (emphasis added)

Implicit in this remark and especially in the phrase "her conception," is a notion now totally discredited by both medicine and law, that is, that the infant *en ventre sa mere* has no separate being. Implicit also is blindness to the profound and elementary fact of the state's moral and constitutional obligation to protect human life in whatever condition it may be, an obligation which, in context, the court below could only envision and describe as "requir[ing] a woman to remain pregnant."

So fundamental and obvious is the state's "interest" in protecting life that discussion is superfluous. Less obvious, perhaps, but equally fundamental is the fact that the embryo from the moment of *its* conception, is a magnificently endowed entity possessing the mystery of life, a life different from that of its mother. The older theory, which appears to have been tacitly resurrected by the court below, *i.e.*, that the infant *en ventre sa mere* is no more than a part of its mother, has long since been rejected by both science and law. As one recent commentator remarked, "To Religion and Medicine, life begins at conception [.]" Gordon, "The Unborn Plaintiff," 63 *Mich. L. Rev.* 579, 581. As the standard treatise on torts says, "[M]edical authority has recognized long since that the child is in existence from the moment of conception, and for many purposes its existence is recognized by the law." Prosser, *The Law of Torts* (3rd ed.), p. 355. Both Gordon, *supra, passim* and Prosser, *supra*, pp. 354-57, indicate that the law's unmistakable, rapid trend has been toward extending the protection accorded to the unborn child.

The trend of the law has followed increasing medical knowledge. It is known, for example, that the conceptus possesses at the moment of its formation the so-called genetic code, the transmitter of all the potentialities which make men human, something not present in either spermatozoon or ovum. Gottleib, *Developmental Genetics* (1966), p. 17.

An article in the *New York Times Magazine* of January 8, 1967, described the process of conception as follows:

> "At last, one-and-only-one sperm penetrates the *** shell of the ovum, and joins its pronucleus with that of the egg. At that moment, conception takes place, and, scientists generally agree, a new life begins--silent, secret, unknown." Coniff, "The World of the Unborn," *New York Times Magazine* (January 8, 1967), p. 41.

Professor Ashley Montagu of Columbia University has written:

> "The basic fact is simple: Life begins, not at birth, but at conception.
>
> "This means that a developing child is alive not only in the sense that he is composed of living tissue, but also in the sense that from the moment of conception, things happen to him, *** he reacts. In spite of his newness and his appearance, he is a living, striving human being from the very beginning." Montagu, *Life Before Birth* (1964), p. 2.

It is true, of course, that an unborn child is weak, parasitic, and dependent upon its mother for survival. But so too is a newborn child. Their helplessness is precisely what entitles them to the special protection of the law, not what justifies their summary extinction. Moreover,

> "The child may be parasitic and dependent, but it is a functioning unit, an independent life. A child is not, in the words of Mr. Justice Holmes, 'a part of its mother.' However visceral may be its temporary residence, however dependent it may be before birth--and for some years after birth--it is a living being, with its separate growth and development, with its separate nervous system and blood circulation, with its own skeleton and musculature, its brain and heart and vital organs." Granfield, *The Abortion Decision* (1969), p. 25.

Finally, in the background of this entire inquiry, lurks this question:

> "How can the law distinguish the day to day development of life? If there is human life, proved by subsequent birth, then that human life has the same rights at conception as it has at any time thereafter. There cannot be absolutes in the minute to minute progress of life from sperm and ovum to all, to embryo, to fetus, to child." *Zepeda v. Zepeda* (1963), 41 Ill. App. 2d 240, 249-50, 190 N.E. 2d 849, 853.

Appellant submits that the above is neither metaphysical gobbledygook nor a verbal smokescreen designed to camouflage the illegality of an archaic statute. Reflected in the entire fabric of modern law and deeply imbedded in legal tradition are the notions dismissed in so cavalier a fashion by the court below, that is, that the unborn child is entitled to the state's protection, and, *a fortiori,* that a state "interest" exists in protecting it against arbitrary and intentional extinction. Virtually every state imposes severe criminal penalties on performers of abortions in all but a limited number of circumstances. See Quay, "Justifiable Abortion--Medical and Legal Foundations," 49 *Geo. L. J.* (1961) 396, Appendix I, pp. 447-520. Present day laws are well rooted in Anglo-American legal traditions and find parallels in other legal systems. *See generally,* Quay, *supra.* The unborn child possesses property rights. It can inherit by will and by intestacy. It can be beneficiary of a trust. Through a *guardian ad litem,* it can assert its rights in courts of law. It can recover for injuries suffered before its birth. *E.g., Puhls v. Milwaukee Automobile Insurance Company* (1959), 8 Wis. 2d 343, 356, 99 N. W. 2d 163. Indeed, at least "nine jurisdictions *** have allowed recovery even though the injury occurred during the early weeks of pregnancy, *when the child was neither viable nor quick.*" (emphasis added). *Prosser, supra,* p. 356. In Wisconsin, under certain circumstances, an action lies

for its wrongful death. *Kwaterski v. State Farm Mutual Automobile Insurance Co.* (1967), 34 Wis. 2d 14, 148 N. W. 2d 107. As suggested earlier in this brief, *its* right to life is under some circumstances entitled to be preferred even to its mother's right to the free exercise of her religion. See, *Raleigh Fitkin-Paul Memorial Hospital v. Anderson* (1964), 42 N. J. 421, 201 A. 2d 537. It has, in short, always been the subject of the law's concern. *See generally*, Gordon, *supra*; Quay, *supra*; and Prosser, *supra*.

None of the unborn child's merely derivative rights, like its property rights or its right not to be injured by another's negligence, are at issue in this lawsuit. At issue instead is a right that is in every sense fundamental and basic, the right to life. At issue is the preciousness of human life and whether and to what extent the state can afford it protection while it exists in its least developed and most helpless form.

It is not unreasonable, appellant submits, and therefore, *a fortiori*, not unconstitutional, for a state to say, as has Wisconsin, that human life, however embryonic, may not be snuffed out unless another human life will otherwise be lost. Although the matter is rendered somewhat uncertain by hard-to-find statutory exceptions and by judicial interpretations, it would appear *that most other states say exactly the same thing*. See, Quay, *supra*, Appendix I, pp. 447-520, "[I]n all but a minimal number of states, by express statutory provision, preservation of the life of the mother is made the only excuse for abortion." *Gleitman v. Cosgrove* (1967), 49 N. J. 22, 227 A. 2d 689, 703 (concurring opinion); Quay, *supra*, Appendix I, pp. 447-520.

Thus, the opinion of the three judges below as to the reasonableness of Wisconsin's abortion statute runs counter to legislative opinions held nearly everywhere in the United States that, surely, are of great weight. Wisconsin's "interest" in the

protection of human life is, to utilize the phrase of the trial court, "compelling." Its obligation to protect human life in its prenatal form has long been recognized. Its "interest" in this respect should not casually be swept under the table. The existence and extent of its "obligation" should not be left in question without a full and fair hearing in the Supreme Court of the United States.[7]

The Supreme Court should look long and hard at any decision that purports to find in the United States Constitution an entirely unfettered "right" of anyone, be it government or an individual, to destroy a "human being," be he actual or potential, "defective," "desirable," powerless or strong. Appellant

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[7] It is probably superfluous to add that the decision of the 3-judge court below has caused great uncertainty among doctors and hospitals about their legal and moral obligations. Undoubtedly, greater turmoil will result when the first lawsuit is brought in federal court by an expectant mother, pursuant to 42 U.S.C. § § 1983 and 1985, claiming deprivation of her "constitutional right" to an abortion and demanding that the court either order a doctor to perform an abortion or require defendants to support the child for the rest of its life.

One also wonders about the reaction of the first, proud prospective papa when he learns that he is legally powerless to prevent the destruction of his offspring because the Constitution forbids any interference with his wife's "private decision" to abort their unborn child, however whimsical or spiteful it might be.

submits that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

SIDNEY G. BABBITZ, M.D.,
v. Plaintiff,

E. MICHAEL McCANN, District Attorney of Milwaukee County, F. RYAN DUFFY, JR., Judge of the County Court, Milwaukee County,

Defendants.

No. 69-C-548

Before KERNER, Circuit Judge, and REYNOLDS and GORDON, District Judges.

PER CURIAM

The plaintiff is a physician who challenges the constitutionality of the Wisconsin abortion statute. He seeks an injunction restraining the defendants from enforcing a part of Wis. Stat. §940.04 and a judgment declaring it unconstitutional.

A temporary restraining order was denied by the order of a single-judge district court, and the instant three-judge district court was convened to consider the other issues presented. We hold that portions of the statute are constitutionally invalid, but we decline to enjoin the pending state prosecution of the plaintiff.

The plaintiff is being prosecuted by the district attorney of Milwaukee county for allegedly having performed an

abortion in violation of §940.04, Wis. Stats. The statute provides in part as follows:

"(1) Any person, other than the mother, who intentionally destroys the life of an unborn child may be fined not more than $5,000 or imprisoned not more than 3 years or both.

"(2) any person, other than the mother, who does either of the following may be imprisoned not more than 15 years:

"(a) Intentionally destroys the life of an unborn quick child; or

* * *

"(5) This section does not apply to a therapeutic abortion which:

"(a) Is performed by a physician; and

"(b) Is necessary, or is advised by 2 other physicians as necessary, to save the life of the mother; and

"(c) Unless an emergency prevents, is performed in a licensed maternity hospital.

"(6) In this section 'unborn child' means a human being from the time of conception until it is born alive."

The state warrant issued against Dr. Babbitz reads as follows:

"That the above named Defendant on the 6th day of September, 1969, in the County of Milwaukee, Wisconsin, did feloniously destroy the life of an unborn child of one, [woman], said offense occurring at number 231 West Wisconsin Avenue, Milwaukee, Wisconsin, said abortion not being advised by two other physicians as necessary to save the life of [woman], the mother of said child, said information being obtained by sworn testimony of [woman]before the Honorable Christ T. Seraphim, County Judge, acting as magistrate."

The complaint asserts that there is jurisdiction in this court pursuant to 28 U.S.C. §1343, 42 U.S.C. §1983 and 28 U.S.C. §§2201 and 2202; we agree with such position.

The complaint charges that the Wisconsin statute is unconstitutional for violating the first and fourteenth amendments of the United States Constitution and for abridging the mother's right of privacy. Dr. Babbitz has not been charged with having destroyed an unborn child which was "quick", and therefore subsections (2) and (2)(a) of the statute quoted above are not applicable in the instant case. There is no allegation that the state officials are acting in bad faith in prosecuting Dr. Babbitz.

I. ABSTENTION

The plaintiff has alleged a deprivation of rights secured by the Constitution, and serious federal questions are raised here concerning the constitutionality of certain portions of the Wisconsin abortion statute. Since the complaint seeks injunctive relief and since the statute in question has state-wide operation, the designation of a three-judge court was appropriate under 28 U.S.C. §2281.

The request for an injunction raises a threshhold problem of abstention. Congress, in 28 U.S.C. §2283, has stated a strong policy of abstention, as follows:

> "Stay of State court proceedings. A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Except for those rather recent cases which have noted exceptions to the scope of §2283, the federal courts have generally given the statute literal application. In addition, the policy of abstention has found expression in a long history of judge-made

rules of federal judicial forebearance. Mr. Justice Frankfurter's expressions in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 500-1 (1941), typify these court-fashioned rules of abstention:

> "Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies, whether the policy relates to the enforcement of the criminal law, *Fenner v. Boykin*, 271 U.S. 240; *Spielman Motor Co. v. Dodge*, 295 U.S. 89; or the administration of a specialized scheme for liquidating embarrassed business enterprises, *Pennsylvania v. Williams*, 294 U.S. 176; or the final authority of a state court to interpret doubtful regulatory laws of the state, *Gilchrist v. Interborough Co.*, 279 U.S. 159; cf. *Hawks v. Hamill*, 288 U.S. 52, 61. These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary."

The abstention policy has also played a role in the development of the law of removal of pending state cases to the federal courts. In *City of Greenwood v. Peacock*, 384 U.S. 808, 828 (1966), the Supreme Court observed:

> "...the vindication of the defendant's federal rights is left to the state courts except in the rare situations where it can be clearly predicted by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court."

The approach to abstention which this policy requires has been followed by many federal courts without any general exception being recognized for cases arising under 42 U.S.C. §1983. *Boyle v. Landry*, — F.2d — (7th Cir. February 5, 1970); *Goss v. Illinois*, 312 F.2d 257, 259 (7th Cir. 1963); *Smith v.*

Village of Lansing, 241 F.2d 856 (7th Cir. 1957); *Baines v. City of Danville*, 337 F.2d 579 (4th Cir. 1964); *Vick v. Schiro*, 296 F. Supp. 173 (E.D. La. 1969). Cf. *Cooper v. Hutchinson*, 184 F.2d 119 (3rd Cir. 1950).

One of the reasons underlying this practice of refusing to enjoin pending state prosecutions is particularly apposite to the case at bar. In *Stefanelli v. Minard*, 342 U.S. 117 (1951), a federal court was petitioned to enjoin the use of illegally seized evidence in a state criminal trial. Denying relief, the Supreme Court said, at page 123:

> "The consequences of exercising the equitable power here invoked are not the concern of a merely doctrinaire alertness to protect the proper sphere of the States in enforcing their criminal law. If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law -- with its far-flung and undefined range -- would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issue. Asserted unconstitutionality in the impaneling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court -- all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts."

Notwithstanding the impressive authority which would bar our enjoining the prosecution of Dr. Babbitz, he presses us to issue such an injunction. Perhaps he draws comfort from the fact that the United States Supreme Court has on two separate occasions expressly reserved ruling on the question whether the Civil Rights Act suspends the anti-injunction provisions of §2283. *Cameron v. Johnson*, 390 U.S. 611, 614, n. 3 (1968); *Dombrowski v. Pfister*, 380 U.S. 479, 484, n. 2 (1965).

Also, the plaintiff may arguably find support for his position from expressions by several of the justices of the United States Supreme Court. For example, in *Gorun v. Fall*, 393 U.S. 398, 399 (1969), four members of the Court referred to "our recent decisions saying over and over again that a federal claim in a federal court should be decided by the federal court and not relegated to a state tribunal."

Finally, it may seem somewhat anomalous that a court may find a state statute unconstitutional and yet deny an injunction against its enforcement by the state. In effect, such a ruling might protect all persons from prosecution except the very man who has persuaded us of the statute's unconstitutionality.

Notwithstanding these arguments, we do not believe that the circumstances of this case justify an exception to the oft-repeated and strong policy of federal abstention, especially in a criminal case. The forebearance required under §2283 is not lifted in the case at bar by the teachings of *Dombrowski v. Pfister*, 380 U.S. 479 (1965). We have already noted that the case at bar does not involve a bad faith enforcement of the abortion statute. In addition, we doubt that the prosecution of Dr. Babbitz has resulted in a chilling of his first amendment rights. A first amendment right is more than a personal right; it is also a public right. When such a right is impinged, the general public is hurt, and the effective functioning of our free society is encumbered. This may explain why §2283 is not strictly applied in first amendment cases. We do not accept the plaintiff's claim that his prosecution under the state abortion statute dampened his first amendment rights.

Although the subject of abortion is fraught with highly emotional pressures, we do not find here any "special circumstances" as discussed in *Cameron v. Johnson*, 390 U.S. 611, 618

(1968), which would entitle Dr. Babbitz to injunctive action. Cf. *Machesky v. Bizzell*, 414 F.2d 283 (5th Cir. 1969); *Romero v. Weakley*, 226 F.2d 399 (9th Cir. 1955); 80 *Harv. L. Rev.* 604, 608-9 (1967).

We believe we must apply the standard established in *Douglas v. City of Jeanette*, 319 U.S. 157, 163 (1943); there the Supreme Court observed that it was Congressional policy to leave to the state courts the trial of state criminal cases, and that such proceedings should be enjoined only in exceptional circumstances. We do not regard this as an exceptional case, and Dr. Babbitz is not entitled to injunctive relief. In the event that the state persists in the prosecution of Dr. Babbitz, we have no reason to doubt that the state courts of Wisconsin will fully vindicate his federal constitutional rights. See *Zwicker v. Boll*, 270 F. Supp. 131 (W.D. Wis. 1967), aff'd 391 U.S. 353 (1968); *Soglin v. Kauffman*, 286 F. Supp. 851 (W.D. Wis. 1968).

Notwithstanding our denial of injunctive relief, a federal court is obliged to weigh separately the issue of declaratory relief. in *Zwickler v. Koota*, 389 U.S. 241, 254 (1967), the Supreme Court held that the federal district court must decide the "merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction". Although it was the application for an injunction which triggered the appointment of this three-judge court under §2281, we do not understand that the denial of injunctive relief precludes us from resolving the declaratory judgment application.

II. VAGUENESS

The plaintiff urges that §940.04(5), Wis. Stats., is vague and nebulous upon its face. That sub-section, quoted above, excepts a therapeutic abortion when it is performed under specified terms. We have examined the challenged phraseology and

are persuaded that it is not indefinite or vague. In our opinion, the word "necessary" and the expression "to save the life of the mother" are both reasonably comprehensible in their meaning.

The United States Supreme Court has ruled that a criminal statute must be definite enough to acquaint those who are subject to it with the conduct which will render them liable to its penalties. *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939); *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). See also Unconstitutional Uncertainty–An Appraisal, 40 *Cornell Law Quarterly*, 195, 196 (1955).

We believe that §940.04(5) sets forth with reasonable clarity and sufficient particularity the kind of conduct which will constitute a violation. *Jordan v. De George*, 341 U.S. 223 (1951); *United States v. Ragen*, 314 U.S. 513 (1942). In *United States v. Wurzbach*, 280 U.S. 396, 399 (1930), Mr. Justice Holmes stated:

> "Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk.

In *People v. Belous*, 80 Cal. Rptr. 354, 458 P.2d 194 (1969), the California court found that the words "necessary to preserve her life" in that state's abortion statute were unconstitutionally vague. While the Wisconsin statute uses slightly different language ("necessary to save"), we doubt that the distinction between the words used in the two statutes is significant. However, we do not share the view of the majority in *Belous* that such language is so vague that one must guess at its meaning.

Slightly different language was before the court in *United States v. Vuitch*, 38 L.W. 2275 (D. D.C. November 10, 1969),

which invalidated an abortion law. That statute contained the following expression: "necessary for the preservation of the mother's life or health". The court concluded that the word "health" was vague both in interpretation and in practice. That precise problem is not presented under the terms of the Wisconsin statute.

Our reading of the Wisconsin statute persuades us that it meets the test set forth by the United States Supreme Court in *Connally*, cited above, at page 391:

> "And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

The plaintiff also charges that there is confusion in subsection (6), which provides that the words "unborn child" mean "a human being from the time of conception until it is born alive". The plaintiff may have medical or even practical justification for his disagreement with the correctness of this statutory definition of an unborn child, but he fails in his effort to convince us that the Wisconsin legislature was vague or indefinite in its choice of language.

III. EQUAL PROTECTION OF THE LAWS

The plaintiff contends that the statute denies to him equal protection of the laws as guaranteed by the fourteenth amendment. It is urged that medical facilities are not constant throughout the state and that a doctor in a rural area in Wisconsin might be justified in performing a "necessary" abortion, whereas a doctor treating the same patient in Milwaukee would be unwarranted in performing the abortion because of the availability in Milwaukee of superior medical facilities.

We find more cogency in the argument that a wealthy woman, but not a poor one, is able, upon demand, to secure a safe and legal abortion in Japan or some other locale in which abortion is permitted. We take judicial notice of the fact that there are a number of places throughout the world where legal abortions are available. We have also considered the argument that an affluent woman, unlike the poor one, may enjoy a long-standing, personal relationship with a well-paid physician, who might more likely be willing or able to persuade his fellow doctors to authorize a therapeutic abortion. We are reluctant to equate these types of inequality with a denial of a protected right under the fourteenth amendment. We know of no analogous situation which goes as far as the plaintiff would have us go in applying the fourteenth amendment to the case at bar.

There is presently pending in the United States Supreme Court a challenge to the practice of imposing a jail term upon a defendant who is unable to pay an assessed fine. *Williams v. Illinois*, #1089, probable jurisdiction noted January 19, 1969, 38 L.W. 3267, being an appeal from *People v. Williams*, 41 Ill. 2d 511, 244 N.E.2d 197 (1969). We cannot anticipate that the decision in the *Williams* case will buttress the plaintiff's contention that there is a denial of equal protection of the laws implicit within the Wisconsin abortion statute.

IV. INVASION OF PRIVATE RIGHTS

The ninth amendment to the United States Constitution provides:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

An examination of recent Supreme Court pronouncements regarding the ninth amendment compels our conclusion that the state of Wisconsin may not, in the manner set forth in

§§940.04(1) and (5), Wis. Stats., deprive a woman of her private decision whether to bear her unquickened child.

In terms of the Wisconsin statute, we do not purport to decide the question of a woman's aborting a fetus which has already quickened. We received into evidence the view of a gynecologist that a fetus normally becomes quick at about four and a half months after conception. Dorland's Illustrated Medical Dictionary (24th ed. 1965) defines "quick" as "Pregnant and able to feel the fetal movements." "Quickening" is defined as "The first recognizable movements of the fetus in utero, appearing usually from the sixteenth to the eighteenth week of pregnancy." The plaintiff is being prosecuted under §§940.04 (1) and (5); he is not being prosecuted under those portions of §940.04 which relate to the abortion of a quickened child; therefore, the validity of such provisions are beyond the scope of this opinion.

While problems of over-population, ecology and pollution have been brought to our attention, we deem them secondary as decisional factors in a judicial resolution of the issues at hand. So, too, we find it necessary to set aside arguments involving theological and ecclesiastical considerations.

Obviously, there is no topic more closely interwoven with the intimacy of the home and marriage than that which relates to the conception and bearing of progeny. Recent court cases have considered the sanctity of the right to privacy in home, sex and marriage; however, the concept of private rights, with which the state may not interfere in the absence of a compelling state interest, is one of long standing.

As long ago as 1891, in *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250, 251 (1891), the court said:

> "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to

> the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, 'The right to one's person may be said to be a right of complete immunity: to be let alone.' "

In *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), the United States Supreme Court held that the private right "to marry, establish a home and bring up children" was protected under the fourteenth amendment as an essential liberty. In *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), the court spoke of the "private realm of family life which the state cannot enter".

In *Loving v. Virginia*, 388 U.S. 1 (1967), there was a challenge to the constitutionality of a state statute which purported to restrict marriages solely on the basis of race. While the Supreme Court observed, at page 7, that "marriage is a social relation subject to the State's police power," the court held, at page 12:

> "The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State."

See also *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Farrington v. Tokushige*, 273 U.S. 284 (1927); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). See, generally, Warren and Brandeis, "The Right to Privacy," 4 *Harv. L. Rev.* 193 (1890).

Recent decisions have asserted a judicial application of the ninth amendment to the matter of privacy in marital relations and contraception. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the court struck down the Connecticut statute which forbade the use of contraceptives. In so doing, the Court noted that the Bill of Rights contains both specific and penumbral guarantees which protect an individual from governmental

invasion of the sanctity of his home and the privacies of his life. In the words of the Court, at page 485, many decisions by the Supreme Court "bear witness that the right of privacy which presses for recognition here is a legitimate one." Three of the justices in a concurring opinion stated, at page 491:

> "To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever."

In *People v. Belous*, 80 Cal. Rptr. 354, 458 P.2d 194 (1969). the California supreme court invalidated a state statute which made it illegal to perform an abortion on a woman unless it was necessary to preserve her life. The court said, at page 199:

> "The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex."

The *Belous* court pointed out, at page 200, that although this protected area of privacy is not explicitly stated in the Constitution, it is a fundamental liberty that is implicit in the penumbrae of the Bill of Rights, and is supported, by analogy, in many past decisions.

In *United States v. Vuitch*, 38 L.W. 2275, (D. D.C. November 10, 1969), the court further observed:

> "There has been, moreover, an increasing indication in decisions of the Supreme Court of the United States that as a secular matter a woman's liberty and right of privacy extends to family, marriage and sex matters and may well include the right to remove an unwanted child at least in early stages of pregnancy."

Although no final decision has as yet been rendered, a three-judge court has been convened in New York in a case involving the same issues under consideration here. *Hall v. Lefkowitz*, 305 F. Supp. 1030 (S.D.N.Y. 1969).

In 2 *Loyola University Law Review* 1, 8 (April, 1969), former Supreme Court Justice Tom C. Clark concluded from a study of *Griswold* and its predecessor cases:

> "The result of these decisions is the evolution of the concept that there is a certain zone of individual privacy which is protected by the Constitution. Unless the State has a compelling subordinating interest that outweighs the individual rights of human beings, it may not interfere with a person's marriage, home, children and day-to-day living habits. This is one of the most fundamental concepts that the Founding Fathers had in mind when they drafted the Constitution."

It is clear that in order to justify the regulation of such fundamental private rights, the state must show a compelling need. In *Bates v. Little Rock*, 361 U.S. 516, 524 (1960), the Court stated:

> "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."

The Supreme Court, in *Griswold*, said, at page 485:

> "The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the *use* of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by

means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' *NAACP v. Alabama*, 377 U.S. 288, 307."

A comparable viewpoint was set forth by the California Supreme Court in *Belous*, at page 200, where that court said:

"The critical issue is not whether such rights exist, but whether the state has a compelling interest in the regulation of a subject which is within the police powers of the state. . . ."

Similarly, in the case at bar, we must decide whether the state of Wisconsin has a sufficiently compelling interest to justify the broad restriction on a woman's inherently personal right that is contained in §§940.04(1) and (5), Wis. Stats.

The defendants urge that the state's interest in protecting the embryo is a sufficient basis to sustain the statute. Upon a balancing of the relevant interests, we hold that a woman's right to refuse to carry an embryo during the early months of pregnancy may not be invaded by the state without a more compelling public necessity than is reflected in the statute in question. When measured against the claimed "rights" of an embryo of four months or less, we hold that the mother's right transcends that of such an embryo.

We also find no compelling state interest in a need to protect the mother's life. At common law, abortion was not a crime unless the mother was quick with child. *People v. Belous*, supra, at 198. This position was reflected in the original Wisconsin abortion statute, Wis. R. S. 1849, c. 133, §§ 10 and 11, enacted in 1849, which made abortion a punishable offense only if performed upon an unborn quick child. However, in 1858 the abortion statute was revised by elimination of the word "quick," thereby making it an offense to perform an abortion at any time during pregnancy. This change reflected an interest in protecting the life of the mother, for in 1858 any surgical

procedure done inside the body was extremely dangerous. Today, many types of surgery, including abortion in the first trimester, are safe and routinely employed medical techniques. *People v. Belous*, supra, at 200. Thus, the result of this court's decision that a mother has the right to determine whether to carry or reject an embryo that has not quickened is a return to the common law definition of abortion; this is not a position without well-established precedent in the common law.

We are persuaded that a medical abortion during early pregnancy is not inherently dangerous to the mother. Nor do we find a compelling state interest in connection with the discouragement of non-marital sexual intercourse. The statute involved does not purport to distinguish between married and unmarried women.

We are invited to resolve the philosophical question, raised in some of the amicus curiae briefs, as to when an embryo becomes a child. For the purposes of this decision, we think it is sufficient to conclude that the mother's interests are superior to that of an unquickened embryo, whether the embryo is mere protoplasm, as the plaintiff contends, or a human being, as the Wisconsin statute declares.

There are a number of situations in which there are especially forceful reasons to support a woman's desire to reject an embryo. These include a rubella or thalidomide pregnancy and one stemming from either rape or incest. The instant statute does not distinguish these special cases, but in our opinion, the state does not have a compelling interest even in the normal situation to require a woman to remain pregnant during the early months following her conception.

Under its police power, the state can regulate certain aspects of abortion. Thus, it is permissible for the state to require that abortions be conducted by qualified physicians.

The police power of the state does not, however, entitle it to deny to a woman the basic right reserved to her under the ninth amendment to decide whether she should carry or reject an embryo which has not yet quickened. The challenged sections of the present Wisconsin statute suffer from an infirmity of fatal overbreadth.

V. CONCLUSION

The plaintiff is entitled to a declaratory judgment declaring §§940.04(1) and (5) violative of the United States Constitution. The plaintiff is not entitled to an injunction enjoining the defendants or their successors in office from prosecuting the plaintiff under §§940.04(1) and (5).

IT IS SO ORDERED

APPENDIX "B"

Judgment on Decision by the Court
CIV 32 (7-63)

UNITED STATES DISTRICT COURT
for the
Eastern District Of Wisconsin

SIDNEY G. BABBITZ, M. D.,

vs.

E. MICHAEL McCANN, District Attorney of Milwaukee County, F. RYAN DUFFY, JR., Judge of the County Court, Milwaukee County

Civil Action File No. 69-C-548

JUDGMENT

This action came on for xxx (hearing) before the Court, Honorable Otto Kerner, John W. Reynolds, Myron L. Gordon, United States District Judge, presiding, and the issues having been duly xxxx (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that Sections 940.04(1) and (5) of Wisconsin Statutes are violative of the United States Constitution.

U. S. Dist. Court East of Wis.
FILED
Mar 5 - 1970
at____o'clock____M
RUTH W. LA FAVE, Clerk

Dated at Milwaukee, Wisconsin, this 5th day of March, 1970.

/s/ Ruth La Fave
Clerk of Court

Judgment on Decision by the Court
CIV 32 (7-63)

UNITED STATES DISTRICT COURT
for the
Eastern District of Wisconsin

SIDNEY G. BABBITZ, M. D.

vs.

E. MICHAEL McCANN; District Attorney of Milwaukee County, F. RYAN DUFFY, JR., Judge of the County Court, Milwaukee County

Civil Action File No. 69-C-548

AMENDED
JUDGMENT

This action came on for xxxx (hearing) before the Court, Honorable Otto Kerner, John W. Reynolds, Myron L. Gordon, United States District Judge, presiding, and the issues having been duly xxxx (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that Sections 940.04(1) and (5) of Wisconsin Statutes are violative of the United States Constitution, and it is further ordered that the injunctive relief sought by the plaintiff be and hereby is denied.

U. S. Dist. Court East of Wis.
FILED
Mar 11 1970
at____o'clock____M
RUTH W. LA FAVE, Clerk